

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
FOURTH REGION**

ABI LABORATORIES, INC.

Employer

and

Case 4–RC–20346

TEAMSTERS LOCAL 470, a/w
INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, AFL-CIO¹

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board, herein called the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error, and are hereby affirmed.

2. The Employer was served with a Notice of Representation Hearing by first class mail on December 13, 2001, scheduling a hearing for December 26, 2001. At that time, the Employer was also requested to submit a completed Commerce Questionnaire. The Employer did not file a request to postpone the hearing, but neither the Employer nor any representative of the Employer appeared at or participated in the hearing. The Employer did not submit the Commerce Questionnaire.

The Employer is engaged in materials testing as a subcontractor for various construction contractors. The Employer's President is Brandon Masters, and its Chief Executive Officer is Dorothy Masters.² The Employer currently employs six material testing technicians (herein called MTTs),³ an accountant, and an engineer. According to the records of the Pennsylvania

¹ The Petitioner's name appears as amended at the hearing.

² Dorothy Masters is Brandon Masters' mother, and she also serves as the corporation's Vice President, Secretary, and Treasurer.

³ MTTs are also known as field technicians.

Department of State, of which I take administrative notice, the Employer is a Pennsylvania corporation located at 246 Pancoast Avenue, Springfield, Pennsylvania.⁴

The Employer's MTTs perform various tests on concrete, asphalt, and soil, including density, strength and moisture tests. Since February or March of 2001, the Employer has been performing work primarily for Tony DePaul & Son (herein called DePaul) at the Philadelphia International Airport (herein called the Airport), where DePaul is engaged in the construction of roadways. The Employer also has performed work for several other general contractors at the Airport, including jobs for companies identified as J.B. Marcy,⁵ James D. Henderson, and Abenezio. Abenezio's office is located in Deptford, New Jersey. The Employer has also performed several jobs elsewhere in Pennsylvania in the last twelve months including a job at Ridley High School in Ridley, Pennsylvania.

The most recent Dun & Bradstreet Business Information Report, of which I take administrative notice, indicates that DePaul is a contractor specializing in highway, bridge and utility work, which employs 100 to 400 employees at a time, depending on the season. Its office is in Blue Bell, Pennsylvania, and its territory includes Pennsylvania, New Jersey and Delaware. MTTs Joseph Kania and James Zink both testified that Brandon Masters complained to them during the past year that DePaul owed the Employer a sum between \$40,000 and \$70,000 for services performed. An invoice to DePaul for services rendered by the Employer during the period September 17, 2001 to September 30, 2001 reflects a total cost of \$7,829 for construction testing services. The Employer's employees expect the present job for DePaul to continue for at least another year.

The six MTTs generally work from Monday through Friday for about eight hours per day. Sometimes the employees also work Saturdays or Sundays, for which they earn overtime pay. The MTTs' hourly wages range between \$10 and \$15.50, and MTTs Kania and Zink testified that with overtime pay they earn approximately \$25,000 or \$26,000 annually.⁶

The Employer's equipment includes four nuclear density gauges, valued between \$5,000 and \$12,000 each, four or five air meters valued between \$200 and \$300 each, and six company vehicles. Three of the vehicles are 1996 Chevrolet S-10 pickup trucks, purchased new for between \$15,000 and \$25,000 each. The Employer obtained the other three vehicles at auctions. During the past twelve months, the Employer has purchased a few "bean boxes" for making test specimens of concrete.

In *Tropicana Products*, 122 NLRB 121, 123 (1958), the Board held that jurisdiction may be asserted in any case in which an employer has refused, upon reasonable requests by Board agents, to provide the Board or its agents with information relevant to the Board's jurisdictional determinations, where the record developed at a hearing, duly noticed, scheduled and held, demonstrates the Board's statutory jurisdiction, irrespective of whether the record demonstrates that the Employer's operations satisfy the Board's jurisdictional standards. In this case, the Employer's failure to appear at the hearing despite adequate notice, or to submit the Commerce

⁴ The Notice of Hearing in this case was served at this address.

⁵ A witness also referred to this company as "J.B.M."

⁶ The record does not indicate whether any of the employees receive fringe benefits.

Questionnaire, constitutes a refusal to provide information sufficient to invoke the *Tropicana* rule.⁷

The foregoing evidence demonstrates that the Employer is engaged in interstate commerce sufficient to satisfy the Board's statutory jurisdiction requirement. The Employer regularly employs eight employees, two of whom earned more than \$25,000 during the past 12 months. During a two-week period of a project that has lasted for at least nine months, the Employer derived revenues of \$7,829 from DePaul. Moreover, Brandon Masters told employees that DePaul owed the Employer at least \$40,000 for services it performed. DePaul has between 100 and 400 employees, operates in several states, and is manifestly engaged directly in commerce. As the Employer has derived significant revenues from its work for DePaul, I find that the Employer is an employer engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The Petitioner has negotiated collective-bargaining agreements with various employers and processes grievances on behalf of employees that it represents. Employees serve as and elect officers for the Petitioner and otherwise participate in its activities. I therefore find that employees participate in the Petitioner's affairs and that the Petitioner exists for the purpose of dealing with employers concerning employees' terms and conditions of employment. Moreover, the Board has previously found that Petitioner is a labor organization within the meaning of Section 2(5) of the Act. See *Longshoremen ILA Local 1242 (Dependable Distribution)*, 316 NLRB 1 (1995). Accordingly, I find that the Petitioner is a labor organization within the meaning of Section 2(5) of the Act. *Alto Plastics Manufacturing Corp.*, 136 NLRB 850, 851-852 (1962).

4. The Petitioner and the employee witnesses are unaware of any history of collective bargaining for the Employer's employees, and there is no evidence of any contract bar. The Petitioner claims to represent certain employees of the Employer, and the Employer has not agreed to recognize the Petitioner as the exclusive representative of these employees. Accordingly, a question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The Petitioner seeks to represent a unit of the Employer's full-time and regular part-time MTTs, excluding the engineer and the accountant. MTTs Kania, Zink, James Moses, Scott Litwinko, and John Miller report to work at a construction trailer located at Enterprise Avenue in Philadelphia, Pennsylvania. Brandon Masters works out of a trailer located in Sharon Hill, Pennsylvania, where the MTTs occasionally go to photocopy and submit their required reports. MTT Jean Louis Firman does not presently work in the field, because the Employer only needs five MTTs there. He generally works at his home compiling reports for the other MTTs, but he works in the field as needed. Within the past year Firman has worked at the Airport on the DePaul job on several occasions, performing the same work as the other MTTs. Brandon Masters handles discipline and time off requests for the MTTs, and he personally distributes their paychecks. Neither Kania nor Zink have ever met the Employer's recently hired accountant. The Employer's engineer, whom the MTTs know only as "Walter," is employed by the Employer on a part-time basis. He travels to the job site once or twice a week where he

⁷ See also *Continental Packaging Corp.*, 327 NLRB 400 (1998).

observes the technicians, questions them, and signs off on their reports. He does not personally perform any testing

The Petitioner seeks a unit consisting of a single job classification of employees who work together, perform similar tasks, share common working conditions, and clearly have a community of interest. Although Firmin is not currently working in the field as an MTT, the record shows that he does so as needed. The accountant has no contact with the MTTs, and his job functions are entirely different. The engineer is a part-time employee, whose work is also significantly different than the MTTs' work.⁸ See *Robert W. Hunt Company, Inc.*, 150 NLRB 986, 989 (1965). Accordingly, I find the following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time material testing technicians employed by the Employer, excluding all other employees, engineers, accountants, guards and supervisors as defined in the Act.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently,⁹ subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Additionally, eligible are those employees in the unit who have been employed for a total of 30 working days or more within the period of 12 months, or who have had some employment in that period and have been employed for a total of 45 working days within the 24 months immediately preceding the payroll period ending immediately preceding the date of this Decision, and also have not been terminated for cause or quit voluntarily prior to the completion of the last job for which they were employed.¹⁰ Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by

⁸ The record does not indicate whether the engineer is a professional employee.

⁹ Your attention is directed to Section 103.20 of the Board's Rules and Regulations, a copy of which is enclosed. Section 103.20 provides that the Employer must post the Board's official Notice of Election at least three full working days before the election, excluding Saturdays and Sundays and that its failure to do so shall be grounds for setting aside the election whenever proper and timely objections are filed.

¹⁰ *Steiny & Co.*, 308 NLRB 1323 (1992); *Daniel Construction*, 133 NLRB 264 (1961), modified in 167 NLRB 1078 (1967).

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LIST OF VOTERS

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that an election eligibility list, containing the **full** names and addresses of all the eligible voters, must be filed by the Employer with the Regional Director for Region Four within 7 days of the date of this Decision and Direction of Election. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). The list must be of sufficiently large type to be clearly legible. I shall, in turn, make the list available to all parties to the election. In order to be timely filed, such list must be received in the Regional Office, 615 Chestnut Street, Seventh Floor, Philadelphia, Pennsylvania 19106, on or before **January 30, 2002**. No extension of time to file this list may be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement of such list. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission. Since the list is to be made available to all parties to the election, please furnish a total of **3 copies**, unless the list is submitted by facsimile, in which case no copies need be submitted. To speed preliminary checking and the voting process itself, the names should be alphabetized (overall, or by department, etc.). If you have any questions, please contact the Regional Office.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, Franklin Court, 1099 14th Street, N.W., Room 11613, Washington, D.C. 20570. This request must be received by the Board in Washington by **February 6, 2002**.

Signed: January 23, 2002

at Philadelphia, PA

/s/

JOHN D. BREESE

Acting Regional Director, Region Four

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